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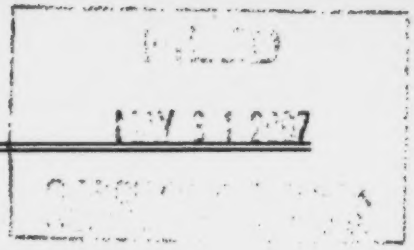

In The

Supreme Court of the United States

NICOLAS LAURENT,

Petitioner,

v.

NANCY N. HERKERT, CHAPTER 13 TRUSTEE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the circuit court's order affirming the district court's order denying the appellant's motion for leave to appeal a bankruptcy court order on the basis that the order was not a final order and the appeal would not afford any relief to the appellant rises to the level of a Writ of Certiorari.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's ruling is unpublished. The district court's ruling denying leave for appeal is unpublished. The opinion of the court of appeals remanding the issue of leave to appeal is unpublished. The opinion of the district court denying the complaint for leave to appeal is unpublished. The bankruptcy court judgment allowing the Chapter 13 trustee to refund monies to Mr. Laurent is unpublished.

STATEMENT

On October 10, 2000, the Plaintiff, Nicolas Laurent ("Laurent"), filed a voluntary petition under Chapter 13 of the Bankruptcy Code, Case Number 00-50881 BKC-PGH [Bankruptcy Docket #1]. Nancy N. Herkert, Chapter 13 Trustee ("Trusteeship") is an entity appointed by the United States Trustee pursuant to 28 U.S.C. §586(b) to serve as the Standing Chapter 13 Trustee in the Miami-Dade Division of the Southern District of Florida and was assigned as the trustee in Case Number 00-50881 BKC-PGH [Bankruptcy Docket #6].

Laurent has filed several appeals. The statement of the case in the Petition for Writ of Certiorari asserts many facts not raised in this case and contains several factual errors. Rather than address each misstatement, the Trusteeship is submitting its own factual statement and has restricted her statement to those facts relating to the issues in this appeal.

In the original bankruptcy schedules filed by Laurent, Laurent disclosed a "guardianship interest" in a non-homestead real property ("Non-homestead Property"). Hugo Martinez ("Martinez") asserted a secured claim based on a mortgage on the Non-homestead Property. Martinez's claim reflected that Laurent was not current in his payments under the mortgage. Laurent's plan included language which disputed the validity of Martinez's lien. Laurent did not provide for any payments to Martinez in the Chapter 13 Plan. Laurent did not file any adversary complaint in the bankruptcy case to determine the validity or amount of Martinez's lien.

On February 20, 2001, Martinez filed a motion for relief from the automatic stay. [Bankruptcy Docket #17]. On February 22, 2001, the bankruptcy court entered an order dismissing the bankruptcy case for failure to fund the proposed plan. [Bankruptcy Docket #18]. The bankruptcy case was reinstated on April 19, 2001, after notice and hearing, when Laurent sent sufficient funds to the Trusteeship to be current in his payments under the proposed Chapter 13 Plan. [Bankruptcy Docket #26]. The bankruptcy case was again dismissed on June 1, 2001 for failure to fund the proposed Chapter 13 Plan. [Bankruptcy Docket #32]. The bankruptcy case was again reinstated on July 21, 2001 after notice and hearing, when Laurent sent sufficient funds to become current under his proposed Chapter 13 Plan to the Trusteeship. [Bankruptcy Docket #38].

On August 7, 2001, Martinez filed a renewed motion for relief from the automatic stay. On September 6, 2001, the bankruptcy court held a hearing on Martinez' motion. Laurent's bankruptcy attorney, Laurent, and his wife, Ms. Sandra Laurent, were present at the hearing and Laurent

stated on the record that they did not oppose the motion as they wanted to proceed with the litigation in state court. [Transcript, page 6 line 18 through page 7 line 11]. The bankruptcy court entered orders prepared by both Martinez' attorney and Laurent's attorney which granted stay relief to Martinez, on September 6, 2001 and again on October 5, 2001. [Bankruptcy Docket #46 and #52]. The orders granted Martinez in rem relief from the automatic stay to proceed with his state court foreclosure action. These orders were never appealed.

Presumably, Martinez and Laurent proceeded to litigate the foreclosure of the Non-homestead Property in state court. [11th Judicial Circuit of Florida, Miami-Dade Division state case number 13-2000-CA-030948-0000-01]. As stay relief was granted and Martinez' lien was not provided for in the plan, the Trusteeship was not a party to and had no knowledge of the state court proceedings regarding the Non-homestead Property.

On November 28, 2001, the bankruptcy court confirmed the Fourth Amended Plan [Bankruptcy Docket #58]. The confirmed Fourth Amended Plan provided for the cure of a mortgage arrearage and tax lien on Laurent's homestead property (a separate property from the Non-homestead Property) and two tax liens on the Non-homestead Property. One of the tax liens on the Non-homestead Property was held by #810 Bank Atlantic a/k/a Bank Atlantic F.S.B. ("Bank Atlantic").

In the bankruptcy court, on October 1, 2002, the Trusteeship issued a Notice of Delinquency in Plan Payments as Laurent had failed to fund the confirmed Fourth Amended Plan. [Bankruptcy Docket #70]. Laurent's attorney filed several modified plan which reflected a

lower payment in the history of the plan to make Laurent appear current with his payments and increased payments in the future of the plan to cure the default. After several hearings on these modified plans, on February 4, 2003, the case was dismissed for failure to file a modified plan which met all the requirements of the Bankruptcy Code and which the bankruptcy court could approve. [Bankruptcy Docket #84]. On March 6, 2003, the bankruptcy court reinstated the case with the approval of a Third Modified Plan on April 17, 2003 which gave Laurent a period of time to cure the delinquency under the original plan. [Bankruptcy Docket #88 and #92].

The Trustee since learned that during the same period of time that Laurent's bankruptcy case was delinquent and the modified plan approved to provide him additional time to cure this delinquency, the state court issued a certificate of title for the Non-homestead Property, on November 13, 2002. Since the issue of ownership and validity of the mortgage were litigated in the state court proceeding rather than in the bankruptcy court, the Trustee has no first hand knowledge of the state court proceedings. The state court clerks docket does reflect that the certificate of title was issued. Therefore ownership is no longer vested in Laurent.

Between January of 2002 and November 2002, Bank Atlantic accepted funds from the Trusteeship on its tax lien. On November 11, 2002, Bank Atlantic returned all funds to the Trusteeship. [Trustee's Final Report]. Later in 2004, the bankruptcy court determined that the funds were returned as the taxes had been paid in full by the new title holder of the Guardian Property.

On December 2, 2002 Laurent filed a motion with the bankruptcy court. [Bankruptcy Docket #75]. The bankruptcy court ordered that Bank Atlantic was bound by the plan and must accept the funds. [Bankruptcy Docket #80]. Between January 2, 2003 and July 22, 2004, the Trusteeship disbursed funds to Bank Atlantic pursuant to the Chapter 13 Plan. [Trustee's Final Report]. Each time Bank Atlantic returned the funds. [Trustee's Final Report].

Again, on September 30, 2003, the Trustee issued a Notice of Delinquency in Plan Payments as Laurent had failed to Make payments to the trustee as required by the approved Third Modified Plan. [Bankruptcy Docket #93]. Laurent filed a fourth modified plan but it did not met the requirements of the Bankruptcy Code and was not approved by the bankruptcy court. At the hearing on the fourth modified plan on December 4, 2003, the bankruptcy court allowed Laurent seven days to file a new modified plan for hearing or the case would be dismissed. On January 7, 2004, Laurent's Chapter 13 case was dismissed for failure to fund the Third Modified Chapter 13 Plan or to file a new modified plan which could be approved by the Court. [Bankruptcy Docket #100]. Laurent failed to make any payments to the Trusteeship in order to fund a plan after October, 2003. [Trustee's Final Report].

After the dismissal, on January 22, 2004, the Trusteeship moved the court to redirect the funds earmarked for Bank Atlantic as Bank Atlantic still refused to accept any funds. [Bankruptcy Docket #102]. On July 20, 2004, after several hearings, the bankruptcy court determined that if the Trustee paid the funds to Bank Atlantic, the creditor would be paid twice on its tax lien. Since the bankruptcy case was dismissed and the state court had issued the certificate of title on the Non-homestead Property, the

bankruptcy court granted the motion to redirect funds and directed the Trustee to return the funds to Laurent. [Bankruptcy Docket #140].

On August 17, 2004, Laurent then filed a complaint with the district court for leave to appeal the bankruptcy order [Bankruptcy Docket #144]. On October 20, 2004, the district court denied the complaint for leave to appeal as Laurent had failed to obtain permission from the bankruptcy court to sue the Trusteeship. [District Court Docket #15].

Laurent appealed the district court's ruling to the Eleventh Circuit of Appeals. On August 22, 2005, the circuit court remanded the matter back to the district court for reconsideration as a motion for leave to appeal rather than a complaint.

On November 18, 2005, the district court denied the motion for leave to appeal as the motion to redirect was not a final order nor would an appeal materially advance the litigation.

Laurent again appealed the district court's ruling to the Eleventh Circuit of Appeals. On August 22, 2006, the circuit court affirmed the district court's ruling. The circuit court's opinion does contain a scrivener's error. The opinion states that the Non-homestead Property was transferred in the state court to the Guardian. The state court transferred the property away from the Guardian.

ARGUMENT

The appellate decision does not conflict with the decision of any other appellate court. There is no federal

question raised in this appeal. The decision is not a departure from the lower court or any other court's decision. In fact there is no question of law at issue in this appeal.

A) THE BANKRUPTCY COURT'S ORDER IS AN ADMINISTRATIVE DECISION

The underlying bankruptcy court order did not resolve any conflicts between any party. The order did not confer or deny any rights of any party nor resolve any issue of law.

The bankruptcy court's order was administrative in nature. The Trustee held funds that were earmarked under the plan to pay Bank Atlantic toward its tax lien on the Non-homestead Property. Bank Atlantic was subject to the automatic bankruptcy stay from recovering its lien from Laurent, the debtor. Laurent agreed to the entry of an order granting relief from the stay to Martinez on the Non-homestead Property. After Laurent lost title to the Non-homestead Property in the state court foreclosure action, he could not prevent the new title owner from redeeming the taxes. There was no stay in effect against the new title holder of the Non-homestead Property. Bank Atlantic returned all funds disbursed under the bankruptcy as they were paid in full by the new title holder of the Non-homestead Property.

The bankruptcy court's order did not convey any additional rights to the Non-homestead Property to the new title holder of the Non-homestead Property. The bankruptcy court's order did not prejudice Laurent in the state court case. The bankruptcy court's order permitted the Trustee to return funds to Laurent that would

otherwise have overpaid a creditor secured by property no longer held by Laurent.

B) LAURENT RECEIVED DUE PROCESS

Laurent was provided due process. The motion for relief from stay was granted after notice and hearing. In fact, Laurent appeared and stated on the record that he chose to litigate the mortgage issued outside of the federal courts. The Trustee's notice of delinquency in confirmed Chapter 13 Plan payments was served on Laurent. In response to the Trustee's notice Laurent filed several motions to modify, all heard by the bankruptcy court. The Trustee's motion to redirect payments was noticed to all interested parties including Laurent and heard by the bankruptcy court. At each stage of this process, Laurent was afforded the opportunity to come before the court and be heard.

In fact, after the dismissal of the bankruptcy case, the Trustee sought permission from the bankruptcy court to deviate from the plan. All parties had notice of this hearing. At that hearing the bankruptcy court took testimony from Laurent, the Trusteeship, and the creditors. The bankruptcy court determined that Laurent would not benefit from the overpayment to Bank Atlantic. The bankruptcy court found it was in Laurent's best interest for the Trusteeship to return the funds to Laurent.

C) THE CONSTITUTION REQUIRES THAT FEDERAL COURTS GIVE FULL FAITH AND CREDIT TO A STATE COURT DECISION

Laurent is under the misconception that the certificate of title issued by the state court could be overturned

in the bankruptcy court. Even if the funds were paid to Bank Atlantic toward the tax certificate lien on the Non-homestead Property, the certificate of title transferring the Non-homestead Property would still be valid. *Jaffe v. Grant*, 793 F.2d 1182, 1187 (C.A. 11th Cir. (Fla.) 1986). *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 485-86 (1983); *Rooker v. Fidelity Trust Co*, 263 U.S. 413, 416 (1923). Once Laurent consented to relief from the automatic stay to litigate the foreclosure and validity of the mortgage in state court, the bankruptcy court no longer had jurisdiction.

D) FRAUD AND MISCONDUCT WERE NOT RAISED AT THE TRIAL LEVEL

In his appeals, Laurent has alleged fraud and misconduct. None of these allegations were raised in the bankruptcy trial. There is no evidence of any fraud or misconduct in the bankruptcy proceedings. Laurent was represented by counsel and appeared at most hearings in person as well.

Laurent repetitively refers to fraudulent acts allegedly committed prior to the bankruptcy and during the state court proceedings after stay relief was granted. Laurent decided to litigate the matter in state court. After he was unsuccessful in both the state court and bankruptcy court, on appeal Laurent tried to foist an unwarranted duty upon the Trusteeship to protect him from his decision to proceed in state court. Upon the granting of the stay relief motions, the Non-homestead Property was no longer property of the estate. A Chapter 13 trustee is a fiduciary to the Chapter 13 estate, not to the debtor. See *In re: Stevens*, 130 F.3d 1027, 1031 (C.A. 11th (Ga.) 1997).

The Trusteeship had no interest or duties in the state court action.

If there was an issue of mortgage fraud, it was not raised nor litigated in the bankruptcy court. Laurent chose the state court forum to litigate the matter. After being unsuccessful in state court, Laurent cannot now claim he was denied process in the bankruptcy court. It was Laurent's decision which placed the issue before the state court rather than the federal court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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